No. 5823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK (a corporation),
Appellant,

vs.

MURIEL E. COLTHURST,
Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANT.

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Since the filing of appellant's brief herein, appellant has discovered a few recent decisions dealing with the question of whether the rights of an injured person, in an action against an insurance company under a liability policy, are any greater than those of the assured. These decisions bear out the contention of appellant herein, that is, that the rights of an injured person under such a policy are no greater than those of the assured. By leave of court, therefore, appellant files this supplemental brief embodying the authorities mentioned. The cases are:

Miller v. Metropolitan Cas. Ins. Co. of N. Y., (R. I., decided June 7, 1929) 146 Atl. 412;

Stacey v. Fidelity & Casualty Co. of N. Y., 114 Ohio St. 633, 151 N. E. 718;

Metropolitan Casualty Ins. Co. of N. Y. v. Blue, (Ala., decided March 21, 1929) 121 So. 25;

Rohlf v. Great American Mut. Ind. Co., 27 Ohio App. 208, 161 N. E. 232;

Weiss v. N. J. etc. Ins. Co., 228 N. Y. S. 314;

Lundblad v. New Amsterdam Cas. Co., (Mass.) 163 N. E. 874;

Lorando v. Gethro, 228 Mass. 181, 117 N. E. 185, 1 A. L. R. 1374;

Indemnity Ins. Co. v. Davis' Adm'r., 150 Va. 778, 143 S. E. 328.

The following excerpts from the opinion of the courts in the above cases indicate the decisions contained therein and the principle adopted.

Miller v. Metropolitan Cas. Ins. Co. of N. Y., (R. I., decided June 7, 1929) 146 Atl. 412:

This case involved an action brought against an insurance company for property damage caused by the operation of an automobile of the assured. The policy, which was the common type of indemnity policy, provided for the giving of immediate notice of accident by the assured to the insurance company and the immediate forwarding to the insurance company of any process or summons. The evidence showed that notice of the *accident* was immediately given to the insurance company. The insurance company knew nothing, however, of the commencement of any legal proceedings against the assured until informed by plaintiff's attorney that suit had been

brought and judgment obtained by default when the attorney presented an execution showing return unsatisfied and demanded payment of the judgment by the insurance company. The action was brought against the insurance company under G. L. 1928, c. 258, Sec. 7 of R. I. The Rhode Island Statute referred to provided as follows:

> "Every policy hereafter written insuring against liability for property damage * * * shall contain provisions to the effect that the insurer shall be directly liable to the injured party * * * to pay him the amount of damages for which such insured is liable. Such injured party, * * * in his suit against the insured, shall not join the insurer as a defendant. If, however, the officer serving any process against the insured shall return said process 'non est inventus,' the said injured party, * * * may proceed directly against the insurer. Said injured party * * * after having obtained judgment against the insured alone, may proceed on said judgment in a separate action against said insurer: * * * provided, * * * that in no case shall the insurer be liable for damages beyond the amount of the face of the policy. All policies made for the insurance against liability described in this section shall be deemed to be made subject to the provisions hereof, and all provisions of such policies inconsistent herewith shall be void."

The insurance company's plea set up that the policy contained a condition which had been broken and denied liability. Plaintiff replied that the terms of the policy were immaterial and that the condition had not been broken.

The court held that the statute only gave the injured person the right to stand in the place of the

assured and left the insurer free to contest liability under the policy. In its opinion the court said:

> "In construing the statute the right given to the injured person and the obligation undertaken by the insurance company should both be protected if possible. *The aim of the statute as to the injured person was not to place him in a more advantageous position than that of the insured. It was to subrogate him to the right which the insured would have had if he had paid the judgment.* Lundblad v. New Amsterdam Cas. Co., (Mass.) 163 N. E. 874. It was to enable collection to be made from the indemnitor, even if the insured had not been found or had not after recovery of a judgment paid the same. In this respect the statute would enlarge the scope of a policy which contained no such provision. It would create a privity of contract which otherwise would not exist. *At the same time it left the ultimate recovery by the injured person subject to the contractual rights created by the policy. It did not seek to impose a new basis of indemnity not contracted for by the insurance company.*
>
> *"To construe the statute as giving plaintiff an action of debt on the judgment against the insured, obtained without knowledge of the insurance company, would not only impose a new burden upon the insurance company, but totally deprive it of its day in court and opportunity to defend the original case on the merits as provided by the policy. Such construction would be opposed to principles underlying our administration of justice, even if not violative of the constitutional guaranty of due process of law.* Whether the Legislature could pass an act imposing such an absolute liability without notice as a condition of allowing an insurance company to do business, we need not decide. The Legislature has not passed such an act. The provision of the act for nonjoinder of the insurance company in the first suit is clearly to protect the

> insurance company against the well-known tendency of jurors to fail to consider merits if a defendant in an automobile accident case is insured. It is not reasonable to suppose that the Legislature in one provision safeguarded the insurance company and in a following one imposed a liability without opportunity to know of or defend against the claim of an injured person. The portion of the statute allowing the injured party to 'proceed directly against the insurer' was applicable when a process against the insured was returned non est inventus. It did not make the judgment against the insured a final determination that the company was liable under the policy. It gave the right to the injured person to stand in the place of the insured, but left the insurance company free to contest liability under the policy." (Italics ours.)

The court also said:

> "The New York statute and the policy now before us express more clearly what we think our statute intended to do, viz., make plaintiff's rights 'subject to the terms, limits and conditions of the policy.' "

That is what the California statute provides. It provides that an action may be brought "on the policy *and subject to its terms and limitations.*" (Italics ours.)

Stacey v. Fidelity & Casualty Co. of N. Y., 114 Ohio St. 633, 151 N. E. 718:

This was an action by an injured person against an insurance company upon a judgment which had been procured against the assured. The insurance company defended on the ground of breach by the assured of conditions in the policy requiring notice of suit, forwarding of process, etc. The Ohio statute provides as follows:

"Section 9510—Subd. 3: Whenever a loss or damage occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage or death occasioned by such casualty.

Section 9510—Subd. 4: Upon the recovery of a final judgment * * * for loss or damage on account of bodily injury or death, if the defendant in such action was insured against loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in a legal action against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment."

The court first considers Section 9510-3 above quoted and the following language contained therein: "The liability of the insurance company shall become absolute, etc." and holds that the above clause does not mean that the insurance company is thereby deprived of all defenses, but that the word "absolute" means simply that the liability of the company shall become absolute in the sense of the latter part of the same sentence, namely, "that the payment of the loss is not dependent upon the satisfaction by the assured of a final judgment against him for a loss or damage or death occasioned by such casualty."

The court then considers Section 9510-4 and says:

"The provisions of section 9510-4, permitting legal action to be brought against the insurance company after judgment obtained against the assured, is more troublesome. In construing this language it is again the duty of the court to give to the statute such an interpretation as will prevent a declaration of unconstitutionality. Having already found that the conditions in the policy requiring notice were essential terms and conditions, and binding upon the assured, and it being apparent that those conditions were valuable to the insurance company, which materially affect the risk and facilitate the establishment of defenses to claims for damages, it is difficult to see upon what principle of law conditions binding upon the assured could be eliminated from the policy when claims are made by an injured party in a direct action.

"It does not appear in the instant case that there was any fraud or collusion between Stacey and Troyan, *but to permit a recovery in favor of the injured claimant, under circumstances where the assured would have no right to indemnity under his contract, would open the door to the unlimited exercise of fraud and collusion.* It is conceivable that accidents may occur hundreds of miles from the place where the insurance was written, and suit be brought where the possibility of notice and knowledge of the insurance company would be very remote. Even though the suit should be brought in the same jurisdiction where the policy is written, the insurance companies could not reasonably be required to be watchful of the dockets of the courts, and in any event the suit might be brought after the lapse of considerable time from the date of the injury, when all evidence which might have been obtained at an earlier date would have been lost. *There are so many conceivable reasons why the same defenses should be made against the injured party as against the assured that it requires no*

elaborate course of reasoning to reach the conclusion that any effort to place the injured person in a favored position, contrary to the terms of the policy contract, would be in contravention of the due process clauses of the state and federal Constitutions. Section 16, article I, of the Ohio Constitution, requires that 'all courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law,' etc. *It would be a strange measure of justice which would open the courts to a plaintiff and at the same time close them against a defendant who has a perfectly good defense. The reasonable interpretation to be put upon the language of section 9510-4 is that the injured party should be substituted for the assured and subrogated to all of his rights but only such rights as the assured might have been able to maintain against the insurance company when seeking to be indemnified.*" (Italics ours.)

Metropolitan Casualty Ins. Co. of N. Y. v. Blue, (Ala., decided March 21, 1929) 121 So. 25:

This was an action brought against the Metropolitan Casualty Insurance Company by an injured person who had obtained a judgment against the assured. The policy was the customary automobile liability policy and contained the identical provision found in the policy of appellant in the case at bar to the effect that the insolvency of the assured should not release the insurance company and that in case execution against the assured should be returned unsatisfied an action might be maintained by the injured person against the insurance company under the terms of the policy for the amount of the judgment against the assured. In the above case the insurance company defended on the ground of lack

of co-operation by the assured; and the question therefore arose whether such a defense was available in an action brought by the injured person. The court held that the defense was available to the insurance company, and in that respect the court said:

> "The insolvency clause above copied extends the right of action to the injured party, only *under the terms of the policy.* The appellate courts of New York, Maryland, Ohio, and Maine have held that in a suit on a policy with such a clause, when the injured party is the plaintiff, the insurer may assert any defense which it could assert in a suit by the assured as plaintiff. Weiss v. N. J. F. & P. G. Ins. Co., supra; Schoenfeld v. New Jersey F. & P. G. Ins. Co., 203 App. Div. 796, 197 N. Y. S. 606; Roth v. Nat. Auto. M. C. Co., 202 App. Div. 667, 195 N. Y. S. 858; Coleman v. New Amsterdam C. Co., 126 Misc. Rep. 380, 213 N. Y. S. 522; Hermance v. Globe Indemnity Co., 221 App. Div. 394, 223 N. Y. S. 93; U. S. F. & G. Co. v. Williams, (Md.) supra; Rohlf v. Great Am. M. Ind. Co., 27 Ohio App. 208, 161 N. E. 232; Bassi v. Bassi, 165 Minn. 100, 205 N. W. 947. Whereas under the same circumstances, and construing a clause in the same language as that we are considering, the Court of Appeals of Kentucky held, in the case of Metropolitan Cas. Ins. Co. of N. Y. v. Albritton, 214 Ky. 16, 282 S. W. 187, that the injured party had a cause of action which could not be defeated by the assured.
>
> "It seems to us, however, in view of the language of the clause 5 (the insolvency proviso) that the injured party may maintain an action such as this *under the terms of the policy,* but that when the insurer is unable to make a defense, with the expectation of a fair presentation thereof, without the co-operation of the assured, a lack of co-operation without legal excuse or collusion, and in some material respect when

needed, and not waived by the insurer (Miller v. Union Indemnity Co., supra; N. Y. Con. R. Co. v. Mass. B. & Ins. Co., 193 App. Div. 438, 184 N. Y. S. 243; U. S. F. & G. Co. v. Williams, supra; Bradley v. Ill. Auto Ins. Co., 227 Ill. App. 572; 3 Blashfield Cyc. of Auto Law, p. 2654), should be and we hold is a good defense. There is no question of waiver presented on this appeal."

Rohlf v. Great American Mut. Indemnity Co., 27 Ohio App. 208, 161 N. E. 232:

This was an action brought by an injured person against an insurance company, after judgment had been procured against the assured. The insurance company defended on the ground of lack of co-operation by the assured. The court held the defense good, saying:

"Certainly the liability assumed by the company is limited by the terms of its policy, and Rohlf can have no greater right than Chapman himself had. The case must be determined against the plaintiff, because the assured is clearly shown to have violated the provisions of the policy requiring him to co-operate and assist in the defense. Schoenfeld v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796, 197 N. Y. S. 606; Coleman v. New Amsterdam Casualty Co., 126 Misc. Rep. 380, 213 N. Y. S. 522; U. S. Fidelity & Guaranty Co. v. Williams, 148 Md. 289, 129 Atl. 660; Bassi v. Bassi, 165 Minn. 100, 205 N. W. 947; Oakland Motor Car Co. v. American Fidelity Co., 190 Mich. 74, 155 N. W. 729."

Weiss v. New Jersey etc. Ins. Co., 228 N. Y. S. 314:

This was an action brought by an injured person against an insurance company. The court said, in its opinion:

> "*Under the established rule* that any defense available to the insurance company against its assured can be asserted in an action of this character against the injured person, the letters offered in evidence upon the trial are admissible as against the assured, and accordingly are admitted in this action." (Italics ours.)
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> *Lundblad v. New Amsterdam Cas. Co.,* (Mass.) 163 N. E. 874:

This case involved a statute of Rhode Island which provides:

> "Every policy hereafter written insuring against liability for property damage or personal injuries, or both, * * * shall contain provisions to the effect that the insurer shall be directly liable to the injured party * * * to pay him the amount of damages for which such insured is liable. Such injured party * * * after having obtained judgment against the insured alone, may proceed on said judgment in a separate action against said insurer."

The court in considering the above statute, said that it—

> "operates to subrogate the injured person to the rights of the insured defendant."
>
> *Lorando v. Gethro,* 228 Mass. 181, 117 N. E. 185, 1 A. L. R. 1374:

This was a suit brought by one who had recovered judgment for personal injuries against the principal defendant caused by his negligence and against an insurance company which had insured the principal against loss or damage arising from such cause. The Massachusetts statute provides:

> "In respect to every contract of insurance made between an insurance company and any

person, firm or corporation, by which such person, firm or corporation is insured against loss or damage on account of the bodily injury or death by accident of any person, for which loss or damage such person, firm or corporation is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, occasioned by said casualty."

In commenting upon the above clause, "the liability of the insurance company shall become absolute," the court said:

"The clause following, namely, 'the liability of the insurance company shall become absolute,' in its context, means only that the liability of the insurance company, so far as concerns the amount of the loss, shall not thereafter be open to dispute. The insurer's liability is absolute only in respect of the amount of the loss and not in other respects. * * * Whatever may be their degree of financial responsibility, the clause does not mean that the other valid conditions of a contract of casualty insurance are abrogated. *Whatever conditions are imposed by that contract, whether as to written notice by the insured to the insurer of any accident and claim, the delivery to the insured of summons in case of action instituted, as to time of bringing action on the policy, or otherwise, are left in full force, unaffected by this clause.*

"This clause also leaves open for determination the question whether the policy of insurance covers the casualty in issue, or whether otherwise the insurer is liable to the assured. *It does not prohibit any ground of defense which ordinarily would be open to an insurer in an action brought against it by the assured on the policy.* It fore-

closes only the ground that the amount of the loss shall not be open to dispute. * * *

"*The contention is untenable that the words, 'the liability of the insurance company shall become absolute,' mean that the insurance company thereafter shall have no ground of defense open to it.* It is almost inconceivable that the legislature would attempt to make an insurance company unconditionally liable to pay for a loss without giving it an opportunity to require any notices of loss or of actions at law, and thus to ascertain the circumstances out of which the loss arises, and its nature and extent at or near the time when the event occurs, or to make reasonable conditions as to the establishment of its liability under the insurance contract. Such an intent on the part of the general court could not be inferred, in the absence of unequivocal words expressing that purpose so clearly as to be beyond discussion. A statute of such import would present a constitutional question quite different from those now at the bar. It would require unmistakable words to warrant the supposition that the legislature had pressed its power to such an extreme. The instant statute conveys no such meaning. All its words may be given an effective and natural interpretation without reaching so unusual a result." (Italics ours.)

Indemnity Ins. Co. v. Davis' Adm'r., 150 Va. 778, 143 S. E. 328:

This was an action against an insurance company brought by an administrator of a deceased person who had been killed by an automobile of the assured. There is a Virginia statute which is the same as the New York statute requiring the policy to contain a provision to the effect that the insolvency of the assured shall not relieve the insurance company of liability and that if a judgment is procured against the assured and an execution returned unsatisfied, an

action may be brought upon such judgment by the injured person against the insurance company under the terms of the policy. The policy in the above case contained such a provision. There is another Virginia statute which would authorize such an action as was brought in the above case against the insurance company; i. e. Section 5143 of the Code of 1919, relative to contracts made in whole or in part for the benefit of persons not parties to the contract. The insurance company defended on the ground of lack of co-operation by the assured, by reason of which the insurance company had disclaimed liability under the policy. The court said:

> "Whether the right of the administrator in the instant case to maintain this proceeding as plaintiff be rested upon the above statute, or upon the stipulation in the policy, or upon the provisions of section 5143 of the Code, he is seeking only to enforce compliance on the part of the company with the terms of its contract, and the issue between the parties is the same as it was upon the garnishee proceeding in Fentress v. Rutledge, supra; *and therefore the company could make any defense available to it in a suit by the assured.*" (Italics ours.)

When the above authorities are considered in addition to those cited in the brief of appellant heretofore filed in the case at bar, it is apparent that the overwhelming weight of authority is that the rights of an injured person against an insurance company are no greater than those of the assured. A variety of statutes relating to this liability of the insurance company to an injured person have now been considered and the conclusion of the courts of the various jurisdictions which have passed upon these statutes

is seen to be practically uniformly to the effect that the injured person stands in the shoes of the assured and has no greater rights than the assured might assert under the policy against the insurance company.

In *Miller v. Metropolitan Casualty Insurance Company,* (R. I.) 146 Atl. 412, first hereinabove cited, it is also directly held by the court that the provision in a policy that the insured must forward summons or other process as soon as served on him is a condition precedent to any right of action in him against the insurance company.

It is respectfully submitted therefore that Harris, the assured in the case at bar, having breached a material provision of the policy, his rights thereunder have been forfeited and that for that reason the suit of appellee, Muriel E. Colthurst, must likewise fail. As indicated by the brief of appellant heretofore filed herein, the few cases which seem to conflict with the rule as announced in the numerous decisions cited by appellant are plainly distinguishable from the case at bar upon the facts. It is submitted therefore that the case at bar is governed by the overwhelming weight of authority found in the decisions cited by appellant.

Dated, San Francisco,
November 6, 1929.

Respectfully submitted,
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